On Sunday afternoon various witness [sic] observed that [House] had numerous scratches and bruises on his arms, hands and body, there being an especially significant bruise on the knuckle of his right ring finger. [House] explained that these injuries had been sustained innocently earlier during the week, but when Ms. Turner was called as a witness, she said that she had not observed them prior to the evening of July 13. [House] also told investigators that he was wearing the same clothes on Sunday, July 14 as he had been wearing the previous evening. It was later discovered, however, that a pair of blue jeans which he had been wearing on the night of the murder was concealed in the bottom of the clothes hamper at Ms. Turner's trailer. These trousers were bloodstained, and scientific evidence revealed that the stains were human blood having characteristics consistent with the blood of Mrs. Muncey and inconsistent with [House's] own blood. Scientific tests also showed that fibers from these trousers were consistent with fibers found on the clothing of the victim. There were also found on her nightgown and underclothing some spots of semen stain from a male secretor of the same general type as appellant.

Some of the most damaging evidence against [House] was given by his girl friend, Ms. Turner. She at first told investigators that he had not left the trailer during the course of the evening of July 13. Later, however, she modified this testimony to state that he had been in the trailer until about 10:45 p.m. at which time he left to take a walk. She stated that he did not take her automobile. When he returned an hour or so later, he was panting, hot and exhausted. He was no longer wearing his blue jersey or his tennis shoes. The shoes were later found in an area different from the place where [House] told her he had lost them.

> [House] told Ms. Turner that he had thrown away the navy blue tank top because it had been torn when he was assaulted by some persons who tried to kill him. It was after [House's] return to the trailer that Ms. Turner first noticed the bruises and abrasions on his hands referred to previously.
>
> [House's] mother testified that he had not used her automobile on Saturday evening. She testified that during Saturday and Sunday she had been planning to separate from [House's] stepfather and that [House] had been assisting her in her preparations for moving.
>
> At the sentencing hearing the State proved [House's] prior conviction for aggravated sexual assault. [House's] parents testified that he came from a broken home and had been subjected to stress as a result of that experience. [House's] mother also testified that in the interval between the guilt trial and the sentencing hearing appellant had attempted suicide. She read into evidence a letter which he had written to her denying his involvement in the homicide. Apparently he had cut his wrists while in the jail awaiting the sentencing hearing, but the degree and extent of the injuries were not detailed in evidence. They do not appear to have been serious and did not prevent his attending the sentencing hearing.

State v. House, 743 S.W.2d 141, 142-44 (Tenn. 1987). (J.A. 130-35)

The Tennessee Supreme Court affirmed House's conviction and death sentence. (J.A. 145) After concluding that the evidence was sufficient to support both, the Court rejected House's numerous claims of trial error, save one. The Court determined that, in proving House's prior violent felony conviction at the sentencing hearing, the State should not have been permitted to elicit testimony disclosing the length of his sentence for the prior offense

and the fact that he was on parole at the time of the Muncey murder. The Court found the error to be harmless beyond a reasonable doubt, however, given the strength of the evidence establishing the three aggravating circumstances found by the jury, the "minimal proof of any mitigating factor," and "the fact that the State did not make any reference in closing argument to the length of [House's] prior sentence or to his parole status." (*Id.*)

II. State Post-Conviction Proceedings

In 1988, the state trial court denied House's first petition for post-conviction relief, in which he alleged, among several claims, that he had been denied the effective assistance of counsel at trial and sentencing. Following a hearing on the petition at which House elected not to introduce any proof other than the original trial transcript, the trial court denied post-conviction relief. On appeal, House raised only one claim – that an alleged error in the jury instructions at sentencing suggested that unanimity was required as to the existence of mitigating circumstances. House did not challenge the trial court's ruling on his ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied House's application for permission to appeal. *House v. State*, No. 28, 1989 WL 152742 (Tenn. Crim. App. Dec. 15, 1989) (app. denied Mar. 5, 1990). This Court denied certiorari. *House v. Tennessee*, 498 U.S. 912 (1990).

In 1990, House filed a second post-conviction petition, in which he once again asserted an ineffective assistance of counsel claim. The trial court summarily denied post-conviction relief, agreeing with the State that all of the grounds raised in the second petition had either been

previously determined in the first post-conviction proceeding or waived.[2] On appeal, the Tennessee Supreme Court affirmed, holding that "[t]he issue of ineffective assistance of counsel was . . . determined on the merits at the initial proceeding and the trial court did not err in dismissing this second post-conviction petition without a hearing." *House v. State*, 911 S.W.2d 704, 711 (Tenn. 1995). (J.A. 201) This court again denied certiorari. *House v. Tennessee*, 517 U.S. 1193 (1996).

III. Federal Habeas Corpus Proceedings

In September 1996, House filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee. On June 25, 1998, the district court granted summary judgment in favor of the State on the majority of House's 56 claims, concluding that the claims were either correctly decided by the state courts or had been procedurally defaulted. As to four remaining claims, the district court determined that they too were procedurally defaulted because House either had failed to raise them in the state post-conviction proceeding or had failed to appeal the post-conviction trial court's

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[2] Under Tennessee law in effect at the time of House's state post-conviction proceeding, the scope of a hearing in state post-conviction proceedings "extend[ed] to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990) (repealed 1995). A ground for relief was held to be "previously determined" if a court of competent jurisdiction "has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) (repealed 1995). A ground for relief was "waived" if the petitioner "knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990) (repealed 1995). By law effective May 10, 1995, the Post-Conviction Procedure Act was rewritten and replaced in its entirety by 1995 Tenn. Pub. Acts, ch. 207, § 1 (now codified at Tenn. Code Ann. § 40-30-101 *et seq.* (2003)).

decision rejecting them. The district court reserved judgment on these claims, however, pending an evidentiary hearing on actual innocence of both the offense and the death penalty and the related claims of ineffective assistance of cousel. (J.A. 315; U.S.D.Ct. Doc. Entry 161)

At the evidentiary hearing, House's proof of actual innocence focused on four primary areas.

DNA Evidence

House presented DNA evidence establishing that he was not the donor of the semen found on the housecoat and underwear Mrs. Muncey was wearing when her body was discovered. (Evid. Hearing Tr., 2/1/99, p. 84) The State did not contest this evidence. The victim's husband, Hubert "Little Hube" Muncey, Jr., testified at the hearing that he and his wife had sexual relations the morning before she disappeared. (Evid. Hearing Tr., 2/3/99, p. 54)

Hubert Muncey's "Confession"

House presented the testimony of Kathy Parker and Penny Letner, sisters who knew the Munceys. According to Parker and Letner, Hubert Muncey attended a party at Parker's home at or near the time of House's trial. Mr. Muncey, who had been drinking heavily, began to cry and said he did not mean to do it. He allegedly then stated that he and his wife were arguing over his failure to take her fishing, and he struck her, causing her to fall and hit her head. When he saw she was dead, he panicked and hid her body. (Evid. Hearing Tr., 2/1/99, pp. 28-29, 37-38) Letner stated that she had not told anyone about the confession because she was afraid and thought no one would listen to her. Parker claimed that she tried to tell authorities but that no one at the sheriff's department would listen to her. (*Id.* at 31) She did not seek to alert House's attorney, the news media, or even other family members concerning the confession. (*Id.* at 39, 44-45) Despite the fact that both women remembered that others were present during the

alleged confession, no one else ever came forward to report it either.

Lora Tharp, the victim's daughter, testified for the State at the evidentiary hearing that, on the night of the murder, she was in bed and heard a deep voice say that her father had been involved in a wreck. (J.A. 270) When she got up to look for her mother, she saw no signs that a fight had occurred in the house. She did not hear any arguments that night. (J.A. 272-73) Mr. Muncey, also called by the State, testified at the hearing that he did not kill his wife and had never told anyone that he had done so. (Evid. Hearing Tr., 2/3/99, pp. 46-48)

Bloodstain Evidence

House sought to explain the presence of the victim's blood on his blue jeans by theorizing that the blood had actually been poured or spilled on the jeans from a sample taken from the victim during her autopsy. At the evidentiary hearing, House presented the testimony of Dr. Cleland Blake, who opined, based upon a marker analysis study conducted by the FBI shortly after the crime, that the blood on the jeans came from the autopsy blood sample. (J.A. 252-53) He testified that it was the "incomplete penetration" of the GLO 1 enzyme in both the jeans sample and the autopsy blood sample, as noted in the marker study, that led him to this conclusion. He based his reading of the marker study on his assumption that the annotation "inc" contained in the report meant "incomplete penetration." (J.A. 254)

FBI Special Agent Paul Bigbee, an expert in forensic serology who prepared the report in question and conducted the marker analysis, testified for the State that the annotation "inc" in the report meant "inconclusive" and that he had not "the foggiest idea" what Dr. Blake meant by the term "incomplete penetration" as it related to serology. (J.A. 282) Paulette Sutton, an expert in blood stain pattern and blood spatter analysis, testified for the State that the bloodstains on the jeans were inconsistent

with blood having been spilled or poured, that several of the stains showed evidence indicating that the blood had been deposited on the jeans while they were being worn, and that some of the stains showed evidence of "clearing" that corresponded to the wrinkling effect one sees when someone is wearing pants and bends or squats, causing areas of the fabric to "accordion" slightly. (J.A. 294-96) Sutton also found that several of the bloodstains were mixed with mud and could not have resulted from spillage, because the blood and mud would have had to have been spilled at the same time. (J.A. 295)

House's Explanation

Although he had not testified at the criminal trial, House did testify at the evidentiary hearing and offered his own story of the relevant events.[3] According to House, on the night of the murder he went for a walk. He had been walking approximately twenty minutes when "two guys" drove up in a four-wheel-drive vehicle and, without provocation, grabbed him by the arm and assaulted him. House claimed that he hit them to get loose and then ran across the road and into the bushes. He heard at least one or two shots fired behind him as he ran. At some point while he was running, he lost one shoe and then threw the other one away when he returned to his girlfriend's trailer. It was also when he returned to his girlfriend's trailer that he discovered his shirt was missing. (Evid. Hearing, 2/3/99, pp. 104-06) He stated that he had not reported the assault to authorities because he was on parole and feared getting in trouble with his parole officer. (*Id.* at 108-09) House acknowledged that the day after Mrs. Muncey's

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[3] House was actually called as an adverse witness at the federal evidentiary hearing by the respondent. (Evid. Hearing Tr., 2/3/99, p. 86) However, on direct examination by his own counsel, House offered an account of his actions on the night of the murder. (Evid. Hearing Tr., 2/3/99, pp. 102-07)

disappearance he was on the road near the spot where the body was found. He maintained, however, that he was simply looking for Mr. Muncey after he learned that Mrs. Muncey was missing and that he had "missed" the Muncey driveway twice as he was driving. (*Id.* at 89-92) He denied killing Mrs. Muncey. (*Id.* at 107)

The District Court's Findings

The district court issued findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a) in a Memorandum Opinion filed February 16, 2000. (J.A. 314) The court made an express finding that the testimony of Parker and Letner concerning Mr. Muncey's alleged "confession" was not credible. (J.A. 348) Similarly, the district court rejected House's testimony: "The court considered Mr. House's demeanor and found that he was not a credible witness." (J.A. 329) In addition, after a lengthy analysis of the conflicting expert testimony concerning the blood evidence, the district court expressly determined that any "spillage [of the autopsy blood sample] occurred *after* the FBI crime laboratory received and tested the evidence." (J.A. 348) (emphasis added) The court further concluded that, "the fact that it was not [House's] semen on Mrs. Muncey's clothing does not negate the jury's finding that the murder was committed during the commission of kidnapping or during the attempted commission of rape or kidnapping." (J.A. 350) Based upon these findings, the district court concluded that House had failed to demonstrate his actual innocence and that House's remaining claims were therefore "barred on ground of procedural default." (J.A. 349) The court also rejected House's contention that he is "innocent of the death penalty." (J.A. 350) The district court denied habeas relief and also denied a certificate of appealability. (J.A. 350)

IV. Sixth Circuit Proceedings

In his application for a certificate of appealability to the Sixth Circuit, House specified only two issues for appeal: "[w]hether the District Court properly found that Mr. House had procedurally waived his ... claims by failing to present such claims and/or their factual basis to the state courts ...," and, second, "[w]hether the District Court erred in finding that Mr. House had not established entitlement to proceed on his claims of guilt phase error (e.g., ineffective assistance of counsel, *Brady/Giglio* violations, and police/prosecutorial misconduct) under the actual innocence exception to the procedural bar rule...." (Application for Certificate of Appealability, filed Sept. 15, 2000) Although the Sixth Circuit granted a certificate of appealability on "all claims in the petition," these are also the only two issues that House presented in his appellate briefs. House did not raise a substantive actual innocence claim – i.e., that his execution would violate the Eighth Amendment because of his actual innocence – in his application for a certificate of appealability or in any of the briefs he filed in the Sixth Circuit.

After briefing and argument, and by a vote of 2-1, a three-judge panel of the Sixth Circuit affirmed the judgment of the district court, concluding that "the case against ... [House] remains overwhelming" and that House had failed in his burden to demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *House v. Bell*, 283 F.3d 737, 2002 WL 370260 (6th Cir. 2002) (withdrawn from N.R.S. bound volume).

House filed a petition for rehearing en banc, which was rejected as untimely. Nevertheless, the Sixth Circuit sua sponte granted rehearing en banc upon the request of an unidentified member of the court. In an opinion issued

on November 22, 2002, and by a vote of 6-5, the en banc court decided to hold House's case in abeyance while it certified three questions to the Tennessee Supreme Court. (J.A. 370-71) The stated purpose of the certification order was "to ascertain whether there remains a 'state avenue open to process . . . [House's] claim' [of actual innocence] in this case." (J.A. 352) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (O'Connor, J., concurring)).[4]

After the Tennessee Supreme Court declined to respond to the Sixth Circuit's questions, the case returned to the en banc court, and, in an 8-7 decision, the court again affirmed the judgment of the district court. The court first determined that federal habeas review of House's ineffective assistance claims was barred by an adequate and independent state-law ground. Having found House's ineffective assistance of counsel claims to be procedurally defaulted, the court then turned to his contention that his default should be excused because the failure to consider the merits of his claim would result in a fundamental miscarriage of justice, i.e., that a "constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime" under *Schlup v. Delo*, 513 U.S. 298 (1995). Because the district court conducted an evidentiary hearing at which contested evidence was presented, the court of appeals examined both the evidence and the district court's related factual findings before concluding that House had failed to show that it is more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327. In performing that analysis, the court specifically deferred to the district court's resolution of credibility and factual disputes. *See Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001) ("We review the district court's conclusions of law in the application of [§ 2254] de novo, and its factual

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[4] The Warden unsuccessfully petitioned this Court for a writ of certiorari from the Sixth Circuit's certification order. *See Bell v. House*, 539 U.S. 937 (2003).

findings are reversed only if they are clearly erroneous."). (J.A. 426)

As to the focal points of House's proof, the court of appeals concluded: (1) the fact that the semen found on the victim's clothes came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer; (2) the testimony of two women who allegedly heard Hubert Muncey's "confession" to the murder was not credible, nor was the content of the confession supported by any evidence in the Muncey home where the supposed altercation with the victim took place; (3) in contrast, the testimony of the victim's daughter, who was present in the home on the night of her mother's abduction and murder, was credible and consistent with her trial testimony; (4) the district court's finding that the "spillage [of the vials of blood] occurred after the FBI crime laboratory received and tested the evidence" was not clearly erroneous; and (5) House's theory that the blood on his blue jeans came from vials of blood gathered at Carolyn Muncey's autopsy and not from his physical attack in the course of her murder was based upon a speculative theory about enzyme degradation that was contradicted by other evidence in the record. The court of appeals specifically noted that the unchallenged testimony indicating that the bloodstains and mud on the petitioner's jeans were mixed supports the conclusion that House committed the murder. (J.A. 426-27)

The court further noted that the following facts implicating House remain undisputed:

> [House] lied to investigators about his whereabouts on the night of the murder; he gave inconsistent versions of the origins of the scratches and bruises on his hands and arms; he was seen near where the body was discovered on the day after the murder; he lied about what he was wearing on the night of the murder; blue jeans belonging to House, spattered with blood mixed

> with mud, were found at the bottom of Ms. Turner's laundry hamper; House has a deep voice and Laura [sic] Muncey testified that the man who came to the trailer on the night of the murder had a deep voice; and, according to Ms. Sutton [the State's blood spatter expert at the federal evidentiary hearing], the blood and mud found together on House's blue jeans had been mixed together, which "certainly eliminates the possibility of any stains being created by contamination in an evidence container."

(J.A. 426)

The court of appeals concluded that, "[d]espite his best efforts" in mounting a "concerted attack on his conviction," the "case against House remains strong." (J.A. 426, 428) "We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." (J.A. 428)

SUMMARY OF THE ARGUMENT

House argues that the Sixth Circuit's refusal to permit review of his procedurally defaulted claims was the result of a misapplication of the miscarriage of justice exception defined by this Court in *Schlup v. Delo*, 513 U.S. 298 (1995). He specifically contends that the Sixth Circuit failed to give "reliable, credible evidence of innocence the appropriate weight" in light of the evidence at trial and that the court improperly rejected his evidentiary submissions as insufficient to permit passage through the *Schlup* gateway "because some record evidence pointing to guilt remained." (Pet. Br. 27) Neither contention justifies relief; the first ignores both presumptively correct factual determinations of the state court and valid credibility determinations entrusted to the district court as trier of fact at the federal evidentiary hearing, and the second misapprehends the basis of the decision below. Moreover, both fail

to take into account the impact of AEDPA on this Court's procedural default jurisprudence.

House's sole evidentiary success at the federal evidentiary hearing – the production of DNA evidence excluding him as the source of semen found on the victim's nightgown – neither exculpates him of the murder nor undermines the body of the State's evidence upon which reasonable jurors convicted him at trial and would still convict. House's other evidence amounts to little more than collateral "cross-examination" of the State's trial evidence more than a decade after the fact in support of the defense theories presented to and rejected by petitioner's jury. None of this supplemental evidence materially undermines the strength of the State's case against him. Indeed, with the exception of the DNA evidence previously mentioned, petitioner's evidence of "innocence" was sharply contested in the federal evidentiary proceeding and is, for the most part, irreconcilable with undisputed evidence of House's guilt introduced at trial. Moreover, House's argument ignores the fact that the district court resolved against him all other material issues of fact that arose at the federal evidentiary hearing, and the Sixth Circuit properly deferred to the district court's factual and credibility determinations. In short, House's new evidence, viewed in light of the record as a whole, fails to establish that "no reasonable juror would have found [him] guilty" of first degree murder. *Schlup*, 513 U.S. at 329.

Moreover, the lower courts' gateway analysis in this case gave House the benefit of a far lower burden of proof than that imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA effectively overruled this Court's decision in *Schlup* and requires a petitioner seeking federal review of procedurally defaulted claims to present "clear and convincing" evidence of factual innocence. Since House's evidence is manifestly insufficient to pass through the "miscarriage of justice"

gateway as defined in *Schlup*, it cannot satisfy the higher standard set by AEDPA.

House's effort to resurrect a substantive innocence claim before this Court is even less availing. First, the issue is not properly before the Court since House presented only a gateway innocence claim in the Sixth Circuit, which limited its decision to that issue. Second, even if he had presented such a claim, the Sixth Circuit would have had no alternative but to reject it under this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), which does not authorize freestanding claims of "actual innocence" by state prisoners in federal habeas proceedings, when, as here, there are state avenues available to process such claims. But even if he could overcome both of these hurdles, his case does not even approach the "truly persuasive demonstration of 'actual innocence'" that this Court hypothesized in *Herrera* might warrant habeas relief.

ARGUMENT

I. HOUSE FAILED TO DEMONSTRATE THAT A FUNDAMENTAL MISCARRIAGE OF JUSTICE WOULD RESULT ABSENT FEDERAL REVIEW OF HIS PROCEDURALLY DEFAULTED CLAIMS.

House challenges the decision of both courts below that the evidence he presented at the federal evidentiary hearing failed to establish that he was innocent of first-degree murder so as to permit review of his procedurally defaulted claims. Both courts reached their decisions by applying the standard of proof announced in *Schlup v. Delo*, 513 U.S. 298 (1995), a case predating Congress's enactment of AEDPA. But House's case, initiated in September 1996, is controlled by AEDPA (J.A. 395), which significantly altered habeas jurisprudence, including the

"miscarriage of justice" exception.[5] While the decision below is fully justified under *Schlup*, AEDPA should be read to impose a more exacting burden on habeas petitioners to overcome state-court defaults.

A. AEDPA Should Be Construed To Elevate the Burden of Proof Required To Excuse a Petitioner's Procedural Default to "Clear and Convincing Evidence."

In *Schlup*, this Court re-affirmed the long-standing principle that a federal court may not consider claims raised in a second or subsequent habeas petition unless the petitioner demonstrates either (1) cause for the failure to raise the claim in his or her initial petition and actual prejudice or (2) that a fundamental miscarriage of justice will result unless the court considers the petitioner's claims.[6] *Schlup*, 513 U.S. at 863. Where a petitioner is unable to establish cause and prejudice sufficient to excuse his failure to present new evidence in support of his first habeas petition, he must demonstrate that his case falls within the "narrow class of cases . . . implicating a fundamental miscarriage of justice," *Schlup*, 513 U.S. at 314-15 (quoting *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991)), an exception that this Court has explicitly tied to the petitioner's factual innocence. *Id.* at 321.[7] *Schlup* defined this "actual innocence" exception in the context of abusive

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[5] Respondent presented this argument in the Sixth Circuit (Supplemental Brief of Respondent, pp. 12-18), but the court rested its decision on House's failure to meet the standard under *Schlup*.

[6] Such petitions may include either "successive" claims, which are identical to claims raised and rejected on the merits in a prior petition, or "abusive" claims, which were available but not relied upon in a prior petition. *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986).

[7] *See also Kuhlmann*, 477 U.S. at 454 (miscarriage of justice may allow successive claims to be heard); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("actual innocence" exception applies to procedurally defaulted claims).

or successive petitions, holding that a petitioner who cannot demonstrate cause and prejudice "must show that it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). En route to that conclusion, the Court rejected the more stringent "clear and convincing" standard set forth in *Sawyer v. Whitley*, 505 U.S. 333 (1992), in which the petitioner claimed "innocence of the death penalty," in favor of the less demanding "more likely than not" standard set forth in *Carrier*, a case involving a procedurally defaulted claim. *Schlup*, 513 U.S. at 326-27.

In 1996, Congress overruled *Schlup* when it enacted AEDPA. Among its substantial habeas reform provisions, AEDPA completely eliminated the authority of federal courts to entertain successive habeas petitions under § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). As to abusive claims (i.e., those available but not relied upon in a prior petition), AEDPA prohibited review of claims based on new evidence unless the petitioner demonstrates both (1) due diligence in the discovery of the factual predicate and (2) that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish *by clear and convincing evidence* that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2) (emphasis added). AEDPA also imposed nearly identical requirements on a habeas petitioner seeking to obtain an evidentiary hearing where the petitioner failed to develop the factual basis of a constitutional claim in state court.[8] 28 U.S.C. § 2254(e)(2).

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[8] In so doing, AEDPA also superseded *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), by requiring that petitioners satisfy § 2254(e)(2)'s provisions rather than *Keeney*'s cause-and-prejudice standard. *Williams v. Taylor*, 529 U.S. 420, 433 (2000).

Congress's explicit codification of the standard previously rejected in *Schlup* evidences legislative intent to supersede *Schlup*'s holding.[9] *See also Doe v. Menefee*, 391 F.3d 147, 161 (2nd Cir. 2004) (acknowledging AEDPA's "modification" of "actual innocence" doctrine as it applies to successive petitions and undeveloped claims); *Jaramillo v. Stewart*, 340 F.3d 877, 881 (9th Cir. 2003) (questioning whether *Schlup* "more likely than not" standard applies to post-AEDPA petitioner); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (concluding that the "actual innocence" exception, permitting revival of a defaulted sentencing issue by way of a successive application for relief, does not survive AEDPA); *Diamen v. United States*, 725 A.2d 501, 525 n.23 (D.C. App. 1997) (noting AEDPA's statutory modifications of *Schlup* standard). Because of the statutory nature of the remedy itself, Congress's authority to formulate the standard – and further restrict the availability of habeas relief to state prisoners – is broad. *See Schlup*, 513 U.S. at 343 (Scalia, J., dissenting) ("Within the very broad limits set by the Suspension Clause, the federal writ of habeas corpus is governed by statute.").[10]

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[9] *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). Congress was fully aware when it passed AEDPA's habeas reform provisions that incorporation of the "clear and convincing" standard was tantamount to overruling the probability standard of *Schlup* and *Carrier*. Oh, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo's *Probability Standard for Actual Innocence Claims*, 19 Cardozo L. Rev. 2341, 2351-54 (1998). Indeed, a proposed amendment specifically designed to align AEDPA with those decisions was tabled in the Senate by a vote of 62 to 37. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 Seton Hall Legis. J. 201, 237-39 (1996).

[10] *See also Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which [AEDPA] places on successive habeas petitions are well within the compass of th[e] evolutionary process [of the federal

(Continued on following page)

Although the federal habeas statute does not specifically address procedural default of claims, in light of the changes wrought by AEDPA in the areas of successive, abusive and undeveloped claims, it makes little sense to maintain a remnant of habeas jurisprudence for procedurally defaulted claims that has now become obsolete in these other contexts. First, *Schlup* itself recognized that the "doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas review." *Schlup*, 513 U.S. at 863 (quoting *McCleskey*, 499 U.S. at 490-91). Significant state interests – "in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors" – are implicated by procedural defaults in all their various forms. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Given the similarity in the interests at stake, this Court has found it "irrational to distinguish" among the various forms of default and has sought to harmonize the standards applicable to each in the various default contexts. *Keeney*, 504 U.S. at 7-8.[11] As this Court recognized in *Keeney*, "[t]here is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated." *Id.* at 10.

Furthermore, application of a lower gateway standard for procedurally defaulted claims leads to the anomalous result that a petitioner may pass through the gateway

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habeas statute]."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ("[T]he power to award the writ by any of the courts of the United States [] must be given by written law.").

[11] For example, in *Coleman*, the Court held that the same cause-and-prejudice standard applicable to the failure to raise a particular claim should apply as well to the failure to appeal at all. 501 U.S. at 750. And, in *Keeney*, the Court rejected the "deliberate bypass" exception in *Fay v. Noia*, 372 U.S. 391 (1963), for federal evidentiary hearings where material facts had not been developed adequately in state court in favor of the cause-and-prejudice standard uniformly applied to other state procedural defaults.

only to hit a brick wall on the other side. Under AEDPA's evidentiary hearing provisions, when a petitioner has "failed to develop" the factual basis of a constitutional claim in state court, § 2254(e)(2) prohibits a federal evidentiary hearing unless he can satisfy § 2254(e)(2)'s two-part test, which includes a "clear and convincing" showing that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[12] Thus, a petitioner may pass through the *Schlup* gateway but still be barred from developing the factual basis of the defaulted claim. A pure question of law would receive federal review, but a so-called "mixed" question of law and fact requiring additional evidentiary proceedings would not.[13] Retention of *Schlup* for defaulted claims creates a nearly identical problem to the one this Court attempted to rectify in *Keeney* – a higher burden imposed on prisoners who fail in state court to develop a federal

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[12] In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court interpreted § 2254(e)(2) as indicating congressional intent to "raise the bar" on defaulting state prisoners. *Williams*, 529 U.S. at 433.

[13] That is precisely the result in this case. Because House "failed to develop" the factual basis of the ineffective assistance claim in his first post-conviction proceeding, choosing instead to rely solely on the trial transcript to support his claim and then not appealing the post-conviction court's disposition of that claim, he is now barred from developing additional facts unless he can satisfy § 2254(e)(2). Thus, even if he could pass through the *Schlup* gateway, he is statutorily barred from developing the factual basis of his claim absent a "clear and convincing" showing of innocence. Moreover, because the state court actually adjudicated House's ineffective assistance claim in his first post-conviction proceeding, federal review is further circumscribed by § 2254(d), which limits the scope of review to evidence before the state court at the time of its decision. *See, e.g., Holland v. Jackson*, 542 U.S. 649, 652 (2004) ("[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it."); *Williams v. Taylor*, 529 U.S. 362, 394-96 (2000) (assessing the reasonableness of the Virginia Supreme Court's decision under *Strickland v. Washington*, 466 U.S. 668 (1984), in light of evidence presented in the Virginia trial court).

claim properly than on those who never raise a claim at all.[14]

Schlup's "actual innocence" standard also runs afoul of the presumption of correctness that must be accorded under AEDPA to state-court factual determinations. The *Schlup* analysis hinges upon a petitioner's ability to produce evidence that calls into question a factual determination made by a state court. But AEDPA cloaks the state-court determination of factual guilt, along with underlying factfindings essential to that determination, with a presumption of correctness under 28 U.S.C. § 2254(e)(1), which may be overcome only by clear and convincing evidence. Because the standard of proof in *Schlup* is irreconcilable with § 2254(e)(1), it must necessarily yield to the heightened "clear and convincing" standard mandated by AEDPA.

In sum, by enacting the habeas reform provisions of AEDPA, Congress deliberately altered the balance struck by this Court in *Carrier* and *Schlup* in favor of the interests of comity, finality and federalism. This Court's habeas cases cannot logically be read to allow a distinction between the standards governing procedural default of claims and other forms of default. Because it is "irrational" in theory and unworkable in practice to distinguish between the various forms of procedural default, this Court should clarify that AEDPA raised petitioner's burden of proof for gateway claims of "actual innocence" to clear and convincing evidence and engrafted a due diligence requirement onto such claims for petitioners seeking to overcome procedural default. *See* 28 U.S.C. §§ 2244(b)(2), 2254(e)(2).

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[14] *See also Carrier*, 477 U.S. at 492 (congruence between standards for appellate and trial default reflects judgment that concerns for finality and comity are virtually identical regardless of the timing of the procedural default).

House's evidence plainly flunks that test. In the first place, with the exception of the DNA analysis upon which he relies, all of House's "new" evidence was either available at the time of his state court trial or could have been discovered through the exercise of due diligence. Moreover, as we now show, House's evidence hardly makes out a clearly and convincing case of innocence. Indeed, it even falls far short of the *Schlup* standard.

B. House Failed To Present Evidence Sufficient To Pass Through the "Actual Innocence" Gateway As Defined in *Schlup*, Let Alone Clear and Convincing Evidence of His Innocence.

Even under *Schlup*, House presented insufficient evidence to pass through the "actual innocence" gateway. In fact, the evidence and arguments presented in the district court are of the type that juries hear and reject every day in criminal courts across the country – attempts to undermine expert testimony by challenging the handling of physical evidence, attempts to discredit witnesses by challenging their perception of events, and even providing the jury with a viable alternative suspect.[15] But House must do more than simply devise a potentially successful defense strategy. He must show that his case falls within that "extraordinary" class of cases in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496. To establish the requisite probability under *Schlup*, he was required to demonstrate "that it is more likely than not that *no reasonable juror* would have convicted him [i.e., found him guilty beyond a reasonable doubt] in light of the new evidence." *Schlup*, 513 U.S. at 327 (emphasis added). A claim of actual innocence under *Schlup* must be supported

[15] Indeed, each of these strategies was actually employed at House's own criminal trial.

with "new *reliable* evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.* at 324 (emphasis added).

House argues that the evidence presented in the district court meets that standard and justifies review of his defaulted claims. But his argument ignores virtually all of the district court's factual and credibility determinations and thus empties *Schlup*'s "reliability" requirement of any meaning. Moreover, in order to conclude that House's evidence establishes that he is actually innocent, one would have to (1) disbelieve the State's witnesses concerning the circumstances and timing of events leading up to and immediately following Carolyn Muncey's abduction, including Lora Tharp's testimony concerning the perpetrator's voice and the words used to lure her mother away from the safety of her home and small children late at night; (2) believe House's version of events, even though he is an admitted liar, while ignoring inconsistencies in his statements to police and rejecting as "coincidence" his presence the following morning near where the body was hidden; (3) believe Hubert Muncey's drunken confession – purportedly proclaimed at a party some fourteen years before the federal evidentiary hearing – despite the absence of any evidence corroborating that account of the crime and his sworn denial of ever having made such a confession; (4) believe that local law enforcement personnel and the Tennessee Bureau of Investigation (TBI) engaged in an elaborate conspiracy to frame House by altering physical evidence to an extent undetectable by an FBI serological expert at trial and a blood spatter expert today, all because he "wasn't from around there"; and (5) reject the testimony of three expert witnesses who discounted House's various attempts to explain away the victim's blood on his pants. That twelve out of twelve reasonable jurors would accept this scenario and actually acquit House of murder is not only improbable, it is virtually impossible.

Schlup's reliability component requires the habeas court to determine whether the new evidence is trustworthy by considering it both on its own merits and, where appropriate, in light of the pre-existing evidence in the record. 513 U.S. at 327-28. Once it is determined that the new evidence is reliable, *Schlup* requires the habeas court to consider a petitioner's claim in light of the evidence in the record as a whole. *Id.* Only then is the court able to conclude whether new evidence truly throws the petitioner's conviction into doubt such that "no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[16] *Id.* Where evidence is sharply contested, as in this case, a district court's factual determinations are critical to determining whether a petitioner has met his burden under *Schlup*.

In *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004), the Second Circuit accurately described the *Schlup* analysis as a "hybrid structure," requiring the habeas court to make

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[16] Although *Schlup*'s preponderance standard is significantly lower than the *Sawyer* "clear and convincing" standard, the "no reasonable juror" requirement still imposes a substantial burden on petitioners seeking to excuse default on the ground that they are "entirely innocent." *Schlup*, 513 U.S. at 324-25. As the Second Circuit recently explained, "even if the [habeas] court, as one reasonable factfinder, would vote to acquit, the court must step back and consider whether the petitioner's evidentiary showing most likely places a finding of guilt beyond a reasonable doubt outside the range of potential conclusions that any reasonable juror would reach." *Doe v. Menefee*, 391 F.3d 147, 173 (2d Cir. 2004). *See also Carriger v. Stewart*, 132 F.3d 463, 484-85 (9th Cir. 1997) (Kozinski, dissenting) ("This compact phrase formulates a daunting standard: We must imagine twelve reasonable jurors hearing the original case against the petitioner, as augmented by the new evidence. For a petitioner to pass through the *Schlup* gateway, he must persuade us that every imaginary juror, twelve out of twelve, would vote to acquit him of any involvement in the killing."); *House v. Bell*, 311 F.3d 767 (6th Cir. 2002) (Boggs, dissenting) ("For petitioner to fail to meet the *Schlup* standard, we need only assess that one of those potential jurors has a 50+% likelihood of convicting, considering all the new evidence."). (J.A. 381)

its own credibility determinations as to both the new evidence and evidence in the record that may be thrown into doubt by the new material and then make a probabilistic determination about what reasonable jurors would do. *Doe*, 391 F.3d at 163. The latter inquiry is necessarily dependent upon the first. *See, e.g., Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). Where, as in this case, the habeas court determines that the new evidence is not sufficiently reliable in itself or in light of other record evidence unaffected by the proffer, the court is justified in concluding that the petitioner has failed to demonstrate, as he must, that the criminal justice process has reached the wrong factual result.[17]

House's "case for innocence" rests on four pillars – DNA evidence excluding him as the source of semen found on the victim's nightgown, expert testimony attempting to establish that blood found on House's pants was deposited there after the murder and not in the course of it, testimonial accounts of a drunken confession by the victim's husband, and House's version of events on the night of the murder and the following morning. But his foundation crumbles in light of other record evidence and the district court's factual and credibility findings.

1. The Semen Evidence Does Not Exculpate House.

House contends that DNA evidence, which established that semen on the victim's nightgown and underwear was deposited by her husband and not by House, disproved the

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[17] "[A] petitioner does not pass through the gateway ... if the district court believes it more likely than not that there is *any juror* who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. 333 (O'Connor, J., concurring) (emphasis added).

only motive offered by the prosecution for the commission of the offense – the intent to rape the victim – and thus removed "the central basis for his conviction." (Pet. Br. 39) But, since neither sexual contact nor motive are elements of first degree murder under Tennessee law, this evidence cannot be said to undermine House's conviction. Moreover, House grossly overstates the degree to which the State relied on the semen evidence to support its case. Indeed, the prosecutor did not mention the semen evidence in his principal arguments to the jury at trial or even suggest a possible motive for commission of the offense. Defense counsel, on the other hand, forcefully argued that the State was unable to exclude Hubert Muncey as the source of the semen, a fact that was undisputed at trial.[18] (Trial Tr. 1272-73)

The State never contended at trial that House raped the victim or even that the semen found on Mrs. Muncey's nightgown could only have come from the petitioner. To

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[18] Defense counsel also identified as a weakness in the State's case the absence of any apparent motive for the commission of the offense. (Trial Tr. 1274) In response, the prosecutor downplayed the necessity for such a showing: "The law says that if you take another person's life, you beat them, you strangle them, and then you don't succeed, and then you kill them by giving them multiple blows to the head, and one massive blow to the head, and that causes their brains to crash against the other side of their skull, and caused such severe bleeding inside the skull itself, that you die – that it does not make a difference under God's heaven what the motive was. That is what the law is. The law is that if motive is shown, it can be considered by the jury as evidence of guilt. But the law is that if you prove that a killing was done, beyond a reasonable doubt, by a person, and that he premeditated it, he planned it, it is not necessary for the jury to conclude why he did it. . . . *But motive is not an element of the crime. It is something that you can consider, or ignore. Whatever you prefer. The issue is not motive. The issue is premeditation.*" (Trial Tr. 1302-03) In any event, the remaining evidence at trial – including the timing and circumstances of the abduction, bruising on the victim's thighs, and the presence of blood on the *inside* of House's jeans near the button – is more than sufficient to support an inference that House acted with a sexual motive.

the contrary, on direct examination by the State at petitioner's criminal trial, FBI Special Agent Bigbee testified that, based upon the physical characteristics of the semen stain, the semen on Mrs. Muncey's nightgown and panties *could have been deposited* by her husband, who was, even then, an alternative suspect under the defense theory. (Trial Tr. 655-68) Contrary to House's characterization, motive was by no means the "central basis" of the State's case.[19] Thus, while it is likely that no reasonable juror would have viewed the semen as linking petitioner to the crime in light of the current DNA analysis of the evidence, the DNA analysis does not establish that no reasonable juror would have convicted him.

2. House's Theory about the Origin of Blood on His Jeans Is Speculative and Contradicted by Expert Testimony.

Recognizing that his blood-stained blue jeans were the most compelling physical evidence presented by the State at trial linking him to the crime, House mounted a concerted attack on every aspect of the handling and testing of the evidence.[20] He argued first that vials of blood obtained from the autopsy accidentally spilled en route to the FBI laboratory while being transported in the same

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[19] In addition, House's jury was instructed as to the State's burden of proving the essential elements of first degree murder beyond a reasonable doubt. (Trial Tr. 1319-20) In analyzing "actual innocence" under *Schlup*, a "reasonable" juror will presumably consider fairly all of the evidence presented in the case and will follow the court's instructions to require proof beyond a reasonable doubt. *Schlup*, 513 U.S. at 329.

[20] DNA testing in the federal habeas proceeding confirmed that the donor of the blood on House's jeans "can not be excluded as the biological mother of Lora Ann Tharp." (Evid. Hearing, 2/3/99, p. 110 and Resp. Exh. 6) DNA testing excluded House as the source of the bloodstains on the jeans. (*Id.* at Resp. Exh. 7) Indeed, House does not dispute that it is Carolyn Muncey's blood on his jeans.

evidence container as the blue jeans; then, when that theory was debunked, House argued that local law enforcement authorities, in concert with the TBI, intentionally placed the blood on the jeans in an attempt to frame him, apparently because he "wasn't from around there." Both theories cannot be correct, and to accept either would require that every reasonable juror ignore or discount the testimony of at least two expert witnesses and multiple lay witnesses.

House's "accidental spillage" theory would require that every juror reject outright the testimony of both FBI Agent Bigbee and Paulette Sutton, an expert in bloodstain pattern and stain analysis. Agent Bigbee testified that there was no leakage in the items submitted to him for testing prior to trial. Had there been any indication of contamination, the evidence would have been returned without examination pursuant to FBI policy.[21] (Evid. Hearing Tr., 2/3/99, pp. 134-35) Paulette Sutton testified that the bloodstain patterns on House's jeans were essentially of two types – spatter and transfer – and were inconsistent with blood having been spilled or poured onto the jeans. (*Id.* at 185-86) In addition, Sutton observed transfer stains *inside* the pocket of House's jeans, which would suggest that the staining occurred by placing a bloody hand or other object into the pocket. She also observed stains on the *inside* of the jeans beside the button closure. (*Id.* at 183-84)

House's elaborate conspiracy theory requires an even greater leap. Reasonable jurors would have to discredit nearly every law enforcement official who handled the

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[21] Agent Bigbee testified that, "[i]f there is any indication that the evidence is contaminated in any manner, if there is spillage or leakage, for example, or a broken liquid vial, or any other indication of any kind that it is cross-contaminated, it will not be examined and it will be sent back to the contributor." When asked whether there was any leakage of the blood specimen tubes submitted in this case, Bigbee replied, "No, there was not." (Evid. Hearing Tr., 2/3/99, pp. 134-35)

bloody jeans between Donna Turner's trailer and the FBI laboratory, as well as Agent Bigbee's explanation of the meaning and significance of abbreviations contained in his own enzyme marker study.[22] Moreover, under the evidence in this case, to accomplish the feat House theorizes would be nothing short of fantastic. Paulette Sutton offered uncontested testimony that the staining pattern on House's jeans indicated that blood got onto the jeans while they were being worn. Thus, to prevail under *Schlup*, House would have to convince twelve reasonable jurors that, after the victim's blood samples were obtained during the autopsy and the evidence was packaged, some number of law enforement officials reopened the sealed evidence containers and intentionally placed the blood on House's jeans. Since it is clear from Sutton's testimony that the blood was not simply poured or spilled, one of the officers would have had to don House's jeans while another splattered and wiped blood on both the inside and outside of the jeans. The officer would then have had to remove the jeans and repackage them for transport.[23] Not only is this

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[22] House's theory hinges on the testimony of defense expert Dr. Cleland Blake, who opined that, based on the enzyme marker study conducted by Agent Bigbee, the blood on House's jeans had to have come from the vial of autopsy blood rather than from the assault on Mrs. Muncey. (J.A. 252-53) But his opinion was based entirely upon an erroneous interpretation of an abbreviation contained in the report. Dr. Blake assumed that the annotation "inc" found on the report stood for "incomplete penetrance." (J.A. 255-56) In fact, "inc" stands for "inconclusive," according to Agent Bigbee, who conducted the testing and prepared the report in question. (J.A. 282) Agent Bigbee also specifically disputed Dr. Blake's conclusion that the liquid blood specimen from the victim's autopsy and the cuttings from the petitioner's pants were from the same sample. (J.A. 283)

[23] Of course, TBI Agent Scott would have to agree to lie about the condition of the jeans when he seized them from Donna Turner's trailer so that he could claim that the stains existed at the time he first saw them. Moreover, House's eleventh-hour attempt to discredit Scott's testimony by suggesting that the bloodstains on his jeans could only be seen through a miscroscope (Pet. Br. 25 n.13) is not supported by the

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scenario not "reasonable," it stretches credulity to the breaking point. While it may be remotely possible that some juror would accept one or the other theory, it is simply not possible that *every* juror would do so. Instead, it is far more likely for the principle of Occam's razor to prevail – that the simplest explanation is the best.[24] And in this case, the simplest explanation, the one most consistent with the body of evidence in the case, and the one advanced by the State, is that the victim's blood was splattered and wiped on House's pants during the course of and immediately following his murderous acts. While there is no doubt that spillage of the blood occurred at some point (House's own expert noted as much when he received the evidence for testing prior to trial), the district court found as a fact that it happened "*after* the FBI crime laboratory received and tested the evidence," a finding uncontradicted by any direct evidence. (J.A. 348) (emphasis added) As the Sixth Circuit recognized, appellate review of the district court's findings of fact is made under the clearly erroneous standard. (J.A. 426) *See also* Fed. R. Civ. P. 52(a) ("Findings of fact [by the district court], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (reviewing court oversteps its bounds under Rule 52(a) if it undertakes to duplicate

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record. Paulette Sutton testified in the federal proceedings that, although it is "very hard to see the color [of the stains], specially [sic] after this amount of time," the bloodstains were "dark" and would have been "suspicious." (Evid. Hearing, 2/3/99, pp. 218-19)

[24] Occam's razor (also Ockham's razor): "A rule in science and philosophy stating that entities should not be multiplied needlessly, which is interpreted to mean that the simplest of two or more competing theories is preferable and that an explanation for unknown phenomena should first be attempted in terms of what is already known. [After William of Ockham (1285?-1349)]." The American Heritage Dictionary, 860 (2nd College ed. 1985).

the role of lower court). Where "the district court's account of the evidence is plausible in light of the record viewed in its entirety," clear-error review permits only limited reexamination of factual findings. *Anderson*, 470 U.S. at 573-74. The district court's assessment of the evidence here is not only plausible, it is fully supported by uncontradicted expert testimony.

House's speculative scientific theory in support of an implication of an elaborate conspiracy to frame him is based almost entirely upon an incorrect interpretation of an abbreviation in a scientific report prepared for his original trial. His spillage theory was debunked almost from the start. As Judge Boggs observed below, House cannot prevail under *Schlup* because "some jurors would likely believe the direct testimony and evidence in preference to a disputed scenario requiring perjurious cooperation of numerous government officials." (J.A. 379)

3. Hubert Muncey's Drunken "Confession" Lacks Evidentiary Corroboration, Is Inconsistent with Undisputed Evidence in the Record, and Is Directly Contradicted by Expert Testimony.

House attempts to buttress his case by reviving a theory previously rejected by the jury at trial – that Hubert Muncey, Jr., had both a motive and an opportunity to murder his wife. To do so, he turns to the eleventh-hour testimony of local witnesses regarding an alleged drunken confession and attempts to create an alibi for the night of the murder. Kathy Parker and Penny Letner, two sisters who knew the Munceys, testified that Mr. Muncey attended a party at Ms. Parker's home during the period following the murder. Both women testified that Mr. Muncey had been drinking heavily, began to cry, and then

confessed to killing his wife.[25] Despite the fact that, under either woman's rendition, several other people were apparently present when this "confession" occurred, no one else ever came forward to report it.[26] Artie Lawson testified that, on the morning after the murder, Mr. Muncey came to her house and requested that, if asked, she say that he [Muncey] had been at the dance that Saturday night. (Evid. Hearing Tr., 2/1/99, p. 22)

As to Muncey's alleged "confession," given their fourteen-year delay in coming forward, the district court understandably, and rightfully, viewed the testimony of Parker and Letner with skepticism. *See Schlup*, 513 U.S. at 332 (on remand for application of *Schlup* standard, district court may consider how the timing of affidavits bears on the probable reliability of the evidence). But the time between the alleged confession and the testimony was not the sole factor in the district court's finding that these witnesses were not credible. The court also viewed the substance of their testimony in light of other evidence presented at trial and the federal evidentiary hearing, noting particularly the absence of any physical evidence in

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[25] Muncey allegedly stated that he and his wife were arguing over his failure to take her fishing and that he hit her, causing her to fall and hit her head. When he saw that she was dead, he panicked and hid her body. (J.A. 232-33)

[26] Mary Atkins also testified at the evidentiary hearing that, on the night in question, she saw Carolyn and Hubert Muncey arguing in the parking lot of the dance and that Mr. Muncey "backhanded" his wife. (Evid. Hearing, 2/1/99, p. 13) After that, according to Atkins, Carolyn Muncey left the dance on foot. (*Id.* at 14) But no other witness testified that Carolyn Muncey was present at the dance on July 13, 1985. Moreover, at trial, Pamela Luttrell, a neighbor of the Munceys, testified that she had seen Carolyn Muncey several times during the course of that day, and that Mrs. Muncey and the children visited in the Luttrell home from 8:00 p.m. to approximately 9:30 p.m. on Saturday night. (Trial Tr. 633-34) Luttrell testified that, as she was leaving, Mrs. Muncey stated she was going home to "feed the younguns." (Trial Tr. 634) The autopsy results indicated that Mrs. Muncey died within an hour to an hour and a half after eating her evening meal. (Trial Tr. 996)

the Muncey home to corroborate the substance of Hubert Muncey's alleged "confession,"[27] as well as the testimony of Lora Muncey Tharp that she neither heard nor saw any signs of a struggle or argument on the night of her mother's murder.[28] (J.A. 348) *See Anderson*, 470 U.S. at 575 (even where a witness appears to be telling the truth, the court must evaluate the testimony in light of other evidence, corroboration or lack thereof, internal inconsistency, and any inferences or assumptions that crediting particular testimony would require). The extensive traumatic injuries sustained by Carolyn Muncey in the course of her murder are also inconsistent with Muncey's alleged confession.[29] As to Muncey's alleged attempt to create an

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[27] Dennis Wallace, the Luttrell Chief of Police, responded to the missing persons report made by Hubert Muncey in the early morning hours of July 14, 1985. Wallace testified that he looked around the inside of the Muncey house that night and saw nothing out of order — no furniture knocked over or shoved out of place or any blood that he could detect. (Evid. Hearing Tr., 2/1/99, p. 59) The district court also assessed the testimony of Hubert Muncey himself, who denied making the statement related by Parker and Letner and who testified, subject to cross-examination by petitioner's counsel, concerning his whereabouts on the night of the murder. (J.A. 323-25)

[28] Lora Tharp testified in the federal hearing that the Muncey children usually went to bed around 9:00 or 9:30 p.m. After she had gone to bed on the night of the murder, she "heard a voice saying my dad had a wreck down next to the creek. . . . It was a deep voice that sounded like my papaw, but he was at home." At some point afterward, she and her brother got up to look for their mother in the trailer and outside. Mrs. Tharp heard no arguments between her parents that night. (Evid. Hearing, 2/3/99, pp. 32-35) Similarly, at trial, Lora Muncey, then ten years old, testified that she heard her mother upset and crying when someone "said that daddy had a wreck down the road . . . down next to the creek." (J.A. 19) A short time later, she and her brother went to look for her mother. Not finding her, they returned home and went back to bed. (J.A. 19-20)

[29] Officer Lanny Janeway of the Maynardville Police Department described the condition of Mrs. Muncey's body at the crime scene: "The face and head area . . . appeared bruised, badly bruised. There was dried blood coming from the nose and ears. . . . There was scratches and

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alibi, the district court found that Artie Lawson's testimony at the evidentiary hearing was inconsistent with an affidavit Lawson previously submitted to the court in response to the Warden's motion for summary judgment.[30] (J.A. 319)

Credibility determinations under Rule 52(a) "demand[] even greater deference to the trial court's" factual findings. *Id.* The Sixth Circuit's decision demonstrates the proper regard by an appellate court for the credibility determinations made by a district judge. (J.A. 425) House would have this Court disregard those findings without any basis in the record for doing so.

4. House's Account of His Actions on the Night of the Murder and the Following Morning Is Implausible and Was Properly Rejected out of Hand by the District Court.

Finally, House's testimony adds little to the inquiry. Given that a habeas petitioner has ample motivation to lie at a federal hearing, a petitioner's own testimony that he did not commit the crime for which he was convicted,

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bruises on the throat, scratches on the face, scratches and bruises on the legs. . . . There was a cut on her left forehead." (Trial Tr. 791) Dr. Alex Carabia, who performed an autopsy, testified that Mrs. Muncey had bruises on the anterior and posterior aspects of her neck, on both thighs, on the lower right leg and left knee. Her injuries were consistent with a struggle and traumatic strangulation. (Trial Tr. 984-85, 987) In addition, FBI Agent Chester Blythe testified at trial that fibers found on the victim's nightgown, brassiere, housecoat, panties and in her fingernail scrapings were consistent "in every way that you could examine them" with House's blue jeans. (Trial Tr. 864-65)

[30] Moreover, Lawson's recollection of the timing of Muncey's alleged visit and request makes no logical sense. Muncey's presence at the dance on the night in question was undisputed (Evid. Hearing Tr., 2/1/99, pp. 56-57); he thus had no reason to ask Lawson or anyone else to lie about that fact.

absent clear corroboration, rarely constitutes reliable evidence of actual innocence. House posits that every reasonable juror would believe the following unbelievable scenario: that, at the precise time of Carolyn Muncey's murder and within a two-mile radius of the spot where her body was deposited, he was assaulted without provocation while walking alone by at least two complete strangers; that he hit them in order to escape and then ran across the road into the bushes; that he heard at least one or two gunshots fired behind him as he ran, at some point losing one shoe, then throwing the other away when he returned to his girlfriend's trailer, only then to discover that his shirt was missing (Evid. Hearing Tr., 2/3/99, pp. 104-06); and that he chose not to report this unprovoked violent assault to authorities for fear of getting into trouble (for no apparent reason) with his parole officer. (*Id.* at 108) House also posits that every reasonable juror would believe that he was seen near the victim's body the next morning only because he was looking for Mr. Muncey after learning that his wife was missing, that he twice "missed" the Muncey driveway before deciding to park on the side of the road and walk back toward his house, and that he just happened to encounter Billy Ray Hensley by coincidence near where the body was hidden. (*Id.* at 91) The district judge, who observed House's demeanor and considered the plausibility or implausibility of his story, specifically found that he was not a credible witness. (J.A. 239) Moreover, House's original jury also heard this story through the testimony of Donna Turner and law enforcement accounts of House's statements to them, and they too rejected it.[31]

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[31] House's attempt to discredit the trial testimony of Billy Ray Hensley also does little to advance his cause. First, Hensley was subjected to intense cross-examination at trial concerning his vantage point and observations. Second, it is beyond dispute that Hensley was able to lead others to the spot on the embankment above Mrs. Muncey's body after observing House in the vicinity. He also noted that House was carrying a "dark cloth," an item which, at the time, Hensley had no reason to know might be significant but which was, in all likelihood, the

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In sum, although House characterizes his case as so "extraordinary" that it amounts to "*Schlup* plus," upon examination of the record, the case resolves itself into a series of factual disputes of the type settled by jurors both for and against criminal defendants every day. Indeed, three primary components of House's case for "actual innocence" – the blood evidence, the accounts of a drunken "confession" by the victim's husband, and House's version of the events on the night of the murder – were rejected by the district court as being incredible, inconsistent with the uncontroverted evidence at trial, and/or rebutted by other evidence presented in the federal evidentiary hearing. And the only truly reliable item of new evidence – the DNA semen evidence – does not undermine any element of House's conviction for first degree murder under Tennessee law.

Even if House's evidence could be said to raise a reasonable doubt in the mind of one or even most jurors, that is not enough. *Schlup* requires that evidence supporting a claim of innocence be of such quality that no reasonable juror would reject it and convict. It is not enough simply to chip away at the State's evidence after the fact.[32] Instead, *Schlup* requires that a petitioner present reliable

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dark blue tank top House was wearing when he left Donna Turner's trailer the night of the murder. Both the original jury and the district judge, sitting as fact-finders, have rejected House's attempts to discredit Billy Ray Hensley. Morever, evidence that tends only to impeach testimony at trial is insufficient to establish actual innocence under *Schlup*. *See, e.g., Morris v. Dormire*, 217 F.3d 556, 559 (8th Cir. 2000) (ballistics expert testimony that victim was shot from ten feet away, which was less than the fifty-foot distance indicated by eyewitness at trial, coupled with testimony of two other witnesses contradicting eyewitness's version of events, insufficient to establish innocence under *Schlup*).

[32] Indeed, the proceedings that occurred in this case are precisely the type of federal habeas "retrial" that AEDPA was designed to prevent. *Williams v. Taylor*, 529 U.S. at 403-04; *Bell v. Cone*, 535 U.S. 685, 693 (2002).

evidence to support his claim – evidence that is concrete, verifiable, or otherwise beyond reasonable dispute. To require less would conflate *Schlup*'s actual innocence standard with the standard for prejudice. *See Strickland*, 466 U.S. at 695 (holding the prejudice requires a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt). The Sixth Circuit properly recognized this principle, and its decision should be affirmed.

II. HOUSE IS NOT ENTITLED TO RELIEF ON A SUBSTANTIVE, FREESTANDING CLAIM OF "ACTUAL INNOCENCE."

In addition to House's contention that he has presented sufficient evidence of "actual innocence" of the crime to establish a gateway for the review of his procedurally defaulted claims, he asserts that the evidence is sufficient to establish a substantive, freestanding claim of "actual innocence" that independently warrants federal habeas corpus relief. But House's assertion is bootless for three reasons. First, the issue whether the evidence establishes such a claim is not properly before the Court. Second, this Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), on which House relies, does not authorize a freestanding claim of "actual innocence" as an independent ground for relief. Finally, even assuming arguendo the availability of such a freestanding claim, House has not made a "truly persuasive showing of 'actual innocence.'"

A. House's Freestanding "Actual Innocence" Claim Is Not Properly Before the Court and Should Not Be Reviewed.

House's substantive "actual innocence" issue was not presented in his brief filed in the court of appeals. Indeed, House did not even request from the court of appeals a certificate of appealability on this issue (Motion, filed Sept. 18, 2000), the grant of which is a jurisdictional prerequisite

to court of appeals' review of the issue.[33] *See* 28 U.S.C. § 2253(c). Although the en banc dissenting opinion of Judge Merritt discussed the claim sua sponte (J.A. 428-78), the majority did not address it at all, observing that the only issues presented by the appeal were whether the manner in which the Tennessee courts applied the state-law doctrine of waiver during House's post-conviction proceedings constituted an adequate and independent state procedural bar to his ineffective assistance of counsel claims and, if so, whether that waiver should be excused on the ground that House had established a gateway under *Schlup* for the review of his procedurally defaulted claims. (J.A. 395) The majority concluded: "Having considered the arguments of the parties regarding the two claims that are before us, we affirm the district court's denial of the writ. . . ." (*Id.*)

An issue neither raised before nor passed upon by the court of appeals is not properly before this Court and ordinarily will not be considered. *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This is not an exceptional case, where the petitioner is making a new argument for the first time in support of a claim properly presented below, *see, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where Americans with Disabilities Act coverage issue was raised below, Court would entertain new argument regarding scope of the statute), or where petitioner is presenting a "purely legal question" not addressed by the lower court. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("purely legal question" on Mitchell's claim of immunity held appropriate for resolution despite the fact that the court of appeals did not

[33] Despite House's limited request, *see* p. 13, *supra*, the court of appeals granted a certificate of appealability on "all isues raised in the petition." (Order, filed Oct. 18, 2000) Yet House briefed only two issues, neither of which presented a freestanding "actual innocence" issue.

address it). House abandoned his substantive "actual innocence" claim in the court of appeals, and there is no reason why it should be reviewed now.

B. House's Freestanding "Actual Innocence" Claim Is Not Authorized by *Herrera*.

House assumes that this Court's decision in *Herrera* makes available to him a freestanding claim of "actual innocence" as a ground for habeas corpus relief. But House's assumption is misplaced. In fact, a plain reading of *Herrera* makes it clear that House has no such claim.

The Court's opinion in *Herrera* reiterates a firmly entrenched habeas principle:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact.

506 U.S. at 400 (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)). Because "[t]he guilt or innocence determination in state criminal trials is 'a decisive and portentous event,'" *Herrera*, 506 U.S. at 401 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)), where "'[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens,'" 506 U.S. at 401 (quoting *id.*), this Court's habeas jurisprudence has consistently rejected the cognizability of a substantive actual innocence claim based on newly discovered evidence absent an independent constitutional violation occurring in the underlying state criminal proceeding. "'Federal courts are not forums in which to relitigate state trials.'"

Herrera, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Indeed, as the *Herrera* majority observed, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." 506 U.S. at 401.

Throughout the opinion, *Herrera* returns to its premise that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 506 U.S. at 404. In order to overcome a procedural default, a prisoner may supplement his underlying constitutional claim with a showing of factual innocence demonstrating that a failure to review the merits of the claim would amount to a fundamental miscarriage of justice. *See, e.g., Kuhlmann*, 477 U.S. at 454. But, as Chief Justice Rehnquist observed, the Court has "never held that [the fundamental miscarriage of justice exception] extends to freestanding claims of actual innocence." *Herrera*, 506 U.S. at 405.

The language House seizes upon appears at the end of the majority opinion, where the Court states:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.

Id. at 417. The Court never held, however, that actual innocence would entitle a petitioner to federal habeas relief. It simply assumed such a premise arguendo. House's reliance on *Herrera* as creating such a claim is therefore unjustified.

Yet a further bar to construing *Herrera* as expanding federal habeas law to include a freestanding claim of "actual innocence" is the conditional language House ignores: that federal relief would be warranted only "if there were no state avenue open to process such a claim."

This qualification was made in the context of the Court's remark that, under Texas law, Herrera could file a request for executive clemency. Noting that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," the Court observed that all states authorizing capital punishment have constitutional and statutory provisions for clemency and that "over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Id.* at 411-15. Herrera had not applied for a pardon, or even a commutation, on the ground of innocence or otherwise. *Id.* at 416.

House does not assert that executive clemency is unavailable to him in Tennessee, nor can he. Tennessee has both constitutional and statutory provisions for clemency. *See* Tenn. Const., Art. III, § 6; Tenn. Code Ann. §§ 40-27-101 to 40-27-109 (2003). Indeed, not only does Tennessee's governor have the general power to grant "reprieves, commutations and pardons in all criminal cases after conviction," Tenn. Code Ann. § 40-27-101, but, specifically, he has the power to consider new evidence and, "[a]fter consideration of the facts, circumstances and any newly discovered evidence in a particular case, the governor may grant exoneration to any person whom the governor finds did not commit the crime for which such person was convicted." Tenn. Code Ann. § 40-27-109(a).[34] House has never applied for clemency, and there is nothing

[34] In addition, the Tennessee Supreme Court may certify to the governor that, in its opinion, "there were extenuating circumstances attending the case, and that punishment ought to be commuted." Tenn. Code Ann. § 40-27-106. *See also Workman v. State*, 22 S.W.3d 807, 808-809 (Tenn. 2000) (explaining that the court's certificate of commutation may issue based upon the facts in the record or a combination of record facts and new evidence that is uncontroverted).

in the record demonstrating that this historic remedy for assertions of "actual innocence" is unavailable to him.

Moreover, the Tennessee Post-Conviction Procedure Act allows a state prisoner to move to reopen his post-conviction action with respect to a legal claim if "[t]he claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted" and "[i]t appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside. . . ." Tenn. Code Ann. § 40-30-117(a)(2), (4) (2003). House has made no showing that this procedure is unavailable to him either.[35]

Because *Herrera* cannot be read as establishing a freestanding "actual innocence" habeas claim, House's reliance on *Herrera* is misplaced. Nevertheless, House's phantom claim, even if cognizable, is defeated by the restrictive language of *Herrera* itself, which conditions the availability of such a claim upon there being no state avenue open to process it.

---

[35] In fact, House currently has pending in the Circuit Court of Union County, Tennessee, a "Motion to Reopen Post-Conviction Petition or, in the Alternative, Successive Petition for Post-Conviction Relief, Petition for Writ of *Error Coram Nobis* and/or Petition for Any and All Other Remedies Available to Petitioner under *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001) and/or *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)." *Paul Gregory House v. State of Tennessee*, Union County Circuit Court No. 632.

C. Even If a Freestanding "Actual Innocence" Claim Were Available to House, He Has Not Made a "Truly Persuasive Demonstration of 'Actual Innocence.'"

Assuming for the sake of argument that in a capital case a "truly persuasive demonstration of 'actual innocence'" would warrant federal habeas corpus relief, 506 U.S. at 417, *Herrera* observed that, "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be "extraordinarily high." *Id.* For several reasons, House's showing falls far short of reaching that extraordinarily high threshold.

Although *Herrera* did not articulate a standard for what constitutes a "truly persuasive demonstration of 'actual innocence,'" House proposes the adoption of the standard espoused in Justice White's concurring opinion: "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" 506 U.S. at 429 (White, J., concurring in the judgment) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). This standard is little more than the *Schlup* gateway standard with the quantum of proof modified, and, while it offers a rather clear, straightforward rule, it fails to assuage *Herrera*'s concerns about entertaining such claims.

The formulation of any standard for federal habeas determination of post-trial factual innocence, as opposed to legal innocence, should accommodate at least four basic principles. The first and foremost of these is that the state criminal trial is "the paramount event for determining the guilt or innocence of the defendant." *Herrera*, 506 U.S. at 416. At the state trial, the defendant is clothed with the presumption of innocence, and the State must marshal its

evidence at this critical point in time to overcome that presumption and prove the defendant's guilt beyond a reasonable doubt. Substantial societal resources – economic, political, moral, and judicial – are exhausted in order to achieve an outcome as accurate as humanly possible. The Constitution itself recognizes the trial's preeminence, investing it with an array of procedural safeguards designed to enhance the integrity and reliability of the proceedings. If, despite the fact that the trial comported with due process, the ultimate determination of guilt is to be made by a federal habeas court, the test for "actual innocence" claims must be exceedingly rigorous. Otherwise, the status of the state trial in the first instance is unjustifiably degraded. In this case, no court reviewing House's conviction has ever found that his trial failed to comport with due process of law or that the evidence was not legally sufficient.

Second, once afforded a fair trial and convicted, the petitioner no longer enjoys the presumption of innocence. *See Ross v. Moffitt*, 417 U.S. 600, 610 (1974) ("The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt"). Thus, in the eyes of the law, House does not come before a federal habeas court as one who is "innocent," but, instead, as one who has been convicted by due process of law of a heinous first-degree murder.

Third, it is important to recognize that "there is no guarantee that the guilt or innocence determination [by a federal habeas court] would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications." *Herrera*, 506 U.S. at 403-04. As this Court has recognized, "the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (quoting *Kuhlmann*, 477 U.S. at 473) (internal quotation marks omitted; citation omitted)). In

this case, House's state criminal trial took place in February 1986. The accuracy and reliability of any fact-finding almost twenty years removed from the original verdict must be seriously questioned.

Finally, any new post-trial evidence bearing on the question of guilt or innocence must be regarded as inherently untrustworthy. It is reasonable to presume that there is something suspect about a defense witness who does not come forward until the eleventh hour has passed. *See Herrera*, 506 U.S. at 423 (O'Connor, J., concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism"). Indeed, in this case, the district court reached that very conclusion as to the belated testimony of House's witnesses, who claimed to have heard Hubert Muncey confess to the killing. ("The court is not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." (J.A. 348)) The standard proposed by House does not satisfactorily accommodate these principles. By placing the new evidence on the same plane with the record evidence, House's standard denigrates the preeminence of the jury verdict and fails to discount the inherent untrustworthiness of post-trial evidence. Furthermore, by giving equal weight to newly discovered evidence and record evidence, it fails to account for the diminution of reliability that necessarily occurs with the passage of time. Finally, instead of clothing the convicted defendant with a presumption of guilt, a standard requiring the reviewing court simply to find that "no rational trier of fact could find proof of guilt beyond a reasonable doubt" assumes a neutral starting point.

The principles outlined above dictate that a habeas petitioner should be required to prove that the new evidence on which he relies demonstrates his innocence beyond a reasonable doubt. Because the petitioner is presumed guilty, merely calling the verdict into question is

not enough, and requiring him to demonstrate his innocence is reasonable. Moreover, due to the passage of time and the inherent untrustworthiness of eleventh-hour evidence, it is reasonable to place a significantly higher burden on the petitioner. Finally, requiring that the new evidence be evaluated under a significantly higher burden, shouldered by the petitioner who is attacking the jury verdict, ensures appropriate deference to the original fact-finder, the jury that found him guilty.

The application of this standard would be salutary for other reasons. First, it would assure that a defendant who presented evidence of actual innocence at trial is not placed in a less advantageous position on review than one who makes post-trial assertions of innocence based on newly discovered evidence. Second, it would discourage defendants from using the trial as an initial forum for testing the strength of the State's case before presenting other evidence later in another forum. Third, in capital cases, the high burden of demonstrating innocence would deter a variety of routine and often repetitive "actual innocence" claims foisted upon the federal courts at the last moment in an attempt to forestall an impending execution.

House does not come close to meeting either this standard or the standard he proposes. House's new evidence fails to establish his innocence beyond a reasonable doubt. The semen evidence does not disprove his guilt, Hubert Muncey's "confession" is neither credible nor supported by any physical evidence, and House's theory about the origin of the blood on his jeans is speculative and contradicted by expert testimony. And even viewing both the proffered newly discovered evidence and the entire record before the jury that convicted him, the case against House remains strong; a rational trier of fact would vote to convict. Under either standard, House falls far short of making a "truly persuasive demonstration of 'actual innocence.'"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General
State of Tennessee

MICHAEL E. MOORE
Solicitor General

GORDON W. SMITH
Associate Solicitor General

JENNIFER L. SMITH
Associate Deputy
Attorney General
Counsel of Record

ALICE B. LUSTRE
Senior Counsel

Appendix

28 U.S.C. § 2244 provides in pertinent part:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in the section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless —

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * *

28 U.S.C. § 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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No. 04-8990

FILED

JAN 4 - 2006

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In The
Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

STEPHEN MICHAEL KISSINGER
Counsel of Record
FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.
530 South Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979
(865) 637-7999 fax

GEORGE H. KENDALL
HOLLAND & KNIGHT, LLP
195 Broadway, 25th Floor
New York, NY 10007
(212) 513-3200

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
NORMAN J. CHACHKIN
MIRIAM S. GOHARA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONER

The State urges the Court to reject Mr. House's compelling demonstration of innocence on two grounds. First, it advances a legal argument which it waived in the district court, made untimely in the court of appeals, and withheld from its brief in opposition in this Court, and which is substantively specious. Second, it presents a view of the record and the district court's findings which is factually incomplete and inaccurate. When the facts are properly understood, they leave no doubt that Mr. House has made a showing of innocence more than sufficient to pass through the *Schlup v. Delo*, 513 U.S. 298 (1995), gateway. Such a showing, indeed, calls for relief under the still more demanding standard of *Herrera v. Collins*, 506 U.S. 390 (1993).

I. The State's Argument that AEDPA Amendments Supplanted *Schlup* Is Not Properly Before the Court and Lacks Merit.

The State belatedly seeks to interject into this case an argument that AEDPA amendments to the successor-petition and evidentiary-hearing provisions of the habeas statute implicitly alter the rule of *Schlup v. Delo* under which the case was litigated and decided below. This argument comes too late and is wholly lacking in substantive merit.

A. This argument is not properly before the Court.

In the district court, the State made no argument that any AEDPA amendments altered the *Schlup* standard; instead, it took the position that *Schlup*, as written by this Court, provided the governing standard for determining when a defaulted claim could receive merits review.[1] Both

[1] For example, in its Answer to the Amended Petition, the State said: "[i]n an extraordinary case where a constitutional violation has

(Continued on following page)

parties and the district court analyzed House's evidence of innocence under the *Schlup* test. *See* JA 347.

In the court of appeals, the State made no mention of its present AEDPA argument until the eleventh hour. The appeal was first briefed before a panel, then briefed twice before the *en banc* court. Throughout the panel briefing and the first *en banc* briefing, the State consistently asserted that this Court's *Schlup* decision provided the applicable rule of decision.[2] Only in a supplemental brief during the second *en banc* review did the State advance its AEDPA argument.[3] Seeing that this came so late, none of the fifteen judges of the court of appeals acknowledged it. Like the district court, both the majority and the dissenters assessed House's claim under the governing rule of *Schlup*. *See* JA at 410-11; 432-33; 480.

In this Court, in its brief opposing certiorari, the State argued that the Sixth Circuit's analysis comported with *Schlup*, that the court of appeals had correctly deferred to the district court's findings made as "a putative 'reasonable juror' for purposes of *Schlup*," and that there was no circuit split justifying certiorari. BIO at 13, 19. Nowhere did the Warden suggest that the rule of *Schlup* had been changed by AEDPA or that the standard for showing innocence had been elevated by AEDPA to "clear and convincing evidence." Under Supreme Court Rule 15.2, "a respondent has a duty to 'address any perceived misstatement of fact or law in the petition that bears on what

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resulted in the [conviction] of one who is actually innocent, a federal habeas court may grant the writ even absent a showing of cause for the procedural default. The Supreme Court has stated that to establish the requisite probability, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence that he has presented." Answer 66-67, citing *Schlup v. Delo*, 115 S.Ct. at 867. In discussing the fundamental miscarriage of justice exception in its Post-Evidentiary Hearing Brief/Closing Argument, the State again confirmed that *Schlup* set forth the governing standard. *See* page 2 of that document.

[2] *See* Warden's Proof Brief at 17-18, 26; Final Brief at 16-17, 29-30.

[3] *See* Warden's Supplemental Brief at 12-18.

issues properly would be before the Court if certiorari were granted.'" *Johnson v. California*, 541 U.S. 428, 431-32 (2004). Arguments made for the first time in merits briefing before this Court, seeking to alter the issues decided below and upon which *certiorari* was granted, need not be considered here. *E.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *Roberts v. Galen of Virginia*, 525 U.S. 249, 253-54 (1999); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 170-71 (1999); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, n.9 (1992). And where, as is now the case, a respondent seeks to spring upon the Court belatedly an argument whose "complex nature ... and ... broad implications suggest that its consideration by the lower courts would help in its resolution," the Court has customarily "exercise[d its] ... Rule 15.2 discretion and deem[ed] the argument waived." *Baldwin v. Reese*, 541 U.S. 27, 34 (2004); *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002).

B. AEDPA did not change the rule of *Schlup* in first petition cases.

In any event, the State's argument that AEDPA amendments modified the rule of *Schlup* and now require a first federal habeas petitioner to demonstrate innocence by "clear and convincing" evidence in order to excuse a procedural default is baseless. The State itself concedes, as it must, that "the federal habeas statute does not specifically address procedural default of claims...." Resp. Br. at 22. But the State asks the Court to infer an implicit Congressional intent to abrogate *Schlup* by extrapolating from two 1996 amendments concerning, respectively, second or successive petitions (28 U.S.C. § 2244(b)) and the holding of evidentiary hearings (28 U.S.C. § 2254(e)(2)).[4]

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[4] AEDPA's amended § 2244(b) requires (with one exception) that a petitioner who is seeking to raise a previously-unraised claim in a second or successive federal habeas petition show that the facts underlying the claim would establish his or her innocence by clear and convincing evidence. By its terms, this provision applies only to a "claim

(Continued on following page)

AEDPA made extensive, elaborate, highly detailed amendments to federal habeas corpus practice, abrogating some previously established rules, refining others, and leaving still others intact. Congress obviously knew what it wanted to change and what it did not. It did not undertake to change the *Schlup* standard for adjudicating assertions of actual innocence as miscarriages of justice that will excuse the procedural default of a claim "when dismissal of a *first* habeas petition is at issue." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). And a statute that selectively modifies some things but not others presents an overwhelming case for indulging "the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999).

II. The State's *Schlup* Submission Distorts the Record, Which Shows that the Prosecution's Circumstantial Case Was Based on False and Wholly Unreliable Evidence.

Schlup holds that when a habeas petitioner adduces new evidence of innocence to justify review of a defaulted claim, the new evidence must be examined in the context of all the evidence in the record. 513 U.S. at 327-28. The State's submission flouts this rule. It urges the Court to look only at the evidence that supports the State's case, not all the evidence. And in doing so, again and again it

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presented in a second or successive habeas corpus application," not to first habeas corpus applications, like Mr. House's. Likewise, AEDPA's amended § 2254(e)(2) forbids federal evidentiary hearings when a habeas petitioner has failed to develop facts in state court, unless he or she shows that these facts establish innocence by clear and convincing evidence. By its terms this provision deals only with the circumstances under which a federal district court may "hold an evidentiary hearing," not with the circumstances under which the procedural-default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), will be excused – the question presented in Mr. House's case.

omits important facts and mischaracterizes the district court's factual findings.

The State's aversion to discussing the full record is understandable. For what that record shows is that the State's case against Mr. House at trial consisted of several items of circumstantial evidence only tenuously suggesting guilt, held together and powerfully bolstered by seemingly unassailable scientific evidence: semen consistent with House's found on Ms. Muncey's clothing; Ms. Muncey's blood found on Mr. House's blue jeans. This powerful scientific evidence served both to identify Mr. House as Ms. Muncey's killer and to supply the sole theory offered by the prosecution to explain why Mr. House might have wanted to kill her. But all of this scientific evidence has now been proved worthless, with the State (1) conceding that the semen on Ms. Muncey's clothing was her husband, Hubert Muncey, Jr.'s, and (2) unable to account for one full test tube of blood from Ms. Muncey's autopsy which, according to Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, most likely got onto Mr. House's blue jeans while the jeans and the autopsy blood were bundled together in police custody.

Thus, the whole record reveals much more than a prosecution case no longer capable of convincing reasonable jurors of Mr. House's guilt. It reveals that the scientific-seeming evidence so crucial to the prosecution's theory of guilt at trial was affirmatively misleading. And the record also contains post-trial evidence specifically identifying the person who probably did kill Carolyn Muncey by beating her savagely on the night of July 13, 1985. That person was not Mr. House, who, the evidence shows, was two miles away and without transportation at the time of the killing. It was Hubert Muncey, Jr., who had previously beaten his wife (so that no fewer than four witnesses recalled seeing her prior injuries), who was seen striking his wife near a dance just shortly before her death, who tried to arrange an alibi for the time of her death, who lied about not seeing his wife after he left home early that morning, who lied to law enforcement and to the district court about his history of spousal abuse, and

who later tearfully confessed to friends that he had done the killing.

Unlike the State, Mr. House invites this Court's examination of all the evidence of record. He acknowledges that some of the individual circumstances that the prosecution presented to convict him *could* still be viewed as indicative of guilt. The full record, however, reveals that many of those circumstances provided only equivocal support for the prosecution's case, and that – in order to tie them together and to tie Mr. House to the crime – the prosecution necessarily placed heavy reliance on supposedly unimpeachable scientific evidence that has now been shown to be anything but unimpeachable.

A. On the whole record, the prosecution's circumstantial case without its scientific evidence is equivocal at best, in part exculpatory, and entirely inadequate to convince a reasonable juror of Mr. House's guilt beyond a reasonable doubt.

Wherever the State points to evidence supporting its theory of Mr. House's guilt, the whole record contains countervailing, reliable evidence of Mr. House's innocence. Yes, the record reveals that on the night Carolyn Muncey disappeared from her home, Mr. House was absent from his girlfriend's trailer for an hour and returned bearing signs of a struggle. JA 134-35. But it also reveals that the trailer was two miles from the Muncey home, JA 82, and that Mr. House did not leave the trailer until the time that Ms. Muncey was leaving her home. R4, Vol. VIII, p. 1106. Yes, the record reveals that Mr. House has a low voice and that Ms. Muncey was beckoned from her home by a man with a low voice who honked a car horn. JA 18, 21-22. But it also reveals that Mr. House had no access to a car at the time. JA 87-88, 95-98. The prosecution witness who testified to hearing the man's low voice was Ms. Muncey's ten-year-old daughter, Laura. But Laura also testified that she did not hear any sounds of a struggle at the time when Mr. House was supposedly beating her mother to death

while attempting to rape her. JA 18-27. And some time after Laura woke briefly and heard the man with the low voice, there is evidence placing Carolyn Muncey in the parking lot of the C&C Recreation Center, where she argued with her husband, Hubert Muncey Jr., and the argument ended with his striking her. JA 225-30.

Yes, the record contains testimony by FBI Agent Chester Blythe that on every item of Ms. Muncey's clothing he located blue jeans fibers "consistent in every way that you could examine them" with fibers taken from the blue jeans Mr. House was wearing on the night of the murder. Resp. Br. at 37 n.29. But it also contains Agent Blythe's concessions that (1) the fibers were so common that they could as easily have come from the jeans then being worn by many of the jurors listening to his testimony, R4, Vol. VI, pp. 868-69; and (2) Ms. Muncey's housecoat, bra, and panties were all made of cotton, R4, Exhibit 32; and (3) cotton clothing readily transfers fibers and retains transferred fibers, R4, Vol. VI, p. 867; but (4) no fibers from Ms. Muncey's clothing were found on Mr. House's blue jeans. *Id.*

Yes, the record contains lay testimony by Mr. House's girlfriend, Donna Turner, that she observed injuries to Mr. House's body after he returned to the Turner trailer on the night Carolyn Muncey was murdered. R4, Vol. VI, pp. 1129-30. But it also contains the expert medical testimony of Assistant Chief Medical Examiner of the State of Tennessee, Dr. Cleland Blake, concluding – on the basis of decades of experience and training – that (1) those injuries were too old to have come from a struggle the same night, and (2) they were inconsistent with striking another person. JA 241-43.

Yes, the record contains testimony by Billy Ray Hensley that he saw Mr. House in the vicinity of Ms. Muncey's body on the afternoon following her murder. From the State's argument, one would suppose that the evidence relating to Mr. Hensley's observations of Mr.

House that afternoon consists of Mr. Hensley's testimony that he saw House wiping his hands on a black[5] rag and that, when Hensley soon thereafter returned with a friend, Hensley led the friend to a location from which the friend was able to see Ms. Muncey's body. JA 133. But this is not what the record shows. It shows that (1) when Hensley returned with his friend to the place where he had seen Mr. House, Ms. Muncey's body was not visible from that location or nearby, R4, Vol. V, p. 727; (2) Hensley admitted on cross examination that his original claim that he had seen Mr. House coming up the embankment above Ms. Muncey's body was false; his testimony ultimately was that he saw House only near the roadway, *id.* at 745; and aerial photographs introduced in federal court demonstrated Hensley's view was blocked by a barn, R279, Exhibit 6; (3) Hensley testified that House had affirmatively attracted Hensley's attention by waving him down and telling him that House was looking for Mr. Muncey to help him search for his wife, R4, Vol. V, pp. 690-91; (4) this is consistent with a statement made by Mr. House to the police describing his presence on the roadway that afternoon and his reason for being there, R4, Vol. VII, pp. 966-67; and (5) it is also consistent with testimony by Billy Hankins that he saw a man fitting House's description walking toward the Muncey home along the roadway that day, R4, Vol. VIII, pp. 1176-78, and with testimony by Donna Turner that she saw Mr. House and Mr. Muncey together later in the day. R4, Vol. VIII, p. 1115.

And, yes, the record does show that Mr. House lied to the police about his one-hour absence from Donna Turner's trailer and about the clothes he was wearing on the night of Ms. Muncey's murder. It does show that he gave varying

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[5] The State and the courts below repeatedly describe Hensley's testimony as saying that the rag was "dark." Resp. Br. at 38, n.31; JA 133. This description would perhaps support the prosecution's contention that the rag was actually House's yellow-trimmed navy blue tank top. JA 91. But Hensley's testimony was quite specific that the rag was "black." JA 32-33.